Bank Muamalat Malaysia Bhd v Prolink Marketing Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-335–08 OF 2018
KHADIJAH IDRIS JC
30 APRIL 2019

Banking — Banks and banking business — Guarantee — Plaintiff brought action against defendants for breach of agreement and guarantees — Whether second and third defendants liable for indebtedness of first defendant

Civil Procedure — Summary judgment — Application for — Plaintiff brought action against defendants for breach of agreement and guarantees — Whether there were triable issues to be tried — Whether defendants had defence to plaintiff's claim

The plaintiff was a financial institution licensed to provide Islamic and Syariah related banking products and services. By the plaintiff's letters of offer, the general facility agreement and the Al-Kafalah bank guarantee facility agreement respectively executed between the plaintiff and the first defendant company ('the agreement'), the plaintiff granted, availed and extended banking and credit financing ('the financing') to the first defendant upon the terms and conditions of the agreement. In consideration of the plaintiff making or giving banking and credit facilities or financing to the first defendant, the second and third defendants executed the letter of guarantee and indemnity ('the guarantees'), whereby the second and third defendants guaranteed and agreed unconditionally and irrevocably to pay on demand the aggregate of all sums due and owing by the first defendant to the plaintiff on the same as advanced by the plaintiff together with all commission, profit, cost and charge including legal costs on a full indemnity basis. Pursuant to the first defendant's default in making payment of the financing facilities, the plaintiff commenced this civil action to recover monies due and payable. The plaintiff filed an application to enter summary judgment against all the defendants. However, the plaintiff was not pursuing the application against the first defendant as the first defendant had obtained a court order restraining all legal proceedings against the first defendant. Hence, this application by the plaintiff to enter summary judgment against the second and third defendants only.

Held, allowing the summary judgment application:

(1) The plaintiff had fulfilled the requisite preliminary requirements. Thus, the plaintiff had established a prima facie case in respect of its claim against the defendants. The defendants did challenge the legality, validity and enforcement of the agreement and guarantees. However, these were mere general assertions without specifying the instances or circumstances or the relevant provision of the agreement and guarantee which may render the same to be illegal, invalid or unenforceable. This allegations of illegality, invalidity and unenforceability were not raised by the defendants as triable issues to resist the plaintiff's application for summary judgment. This was mere afterthought on the part of the defendants to deny the plaintiff of their remedy to recover the indebtedness of the first defendant and to evade the defendants' liability under the agreement and guarantees. By their own admission, there was no dispute of the first defendant's liability under the agreement and the second and third defendants' liability under the guarantees to pay to the plaintiff the sum due and owing to the plaintiff in relation to the financing facilities. Premised on the defendants' admission, it was evidently clear that the defendants had no defence against the claim made by the plaintiff (see paras 20 & 24–26).

(2) The defendants' complaint about the alleged oppressive conduct and improper demand by OCBC Bank had no relevance to the plaintiff's claim for the debt outstanding under the financing facilities against the defendants. The defendants' contentions served only as mitigating factors for the consideration of the plaintiff. Thus, the first defendant financial position and OCBC Bank's action in demanding the facilities granted by it to the first defendant was not a defence nor triable issue (see paras 27–28).

(3) The advice given by the Small Debt Resolution Scheme Committee to halt proceedings against the first defendant was not mandatory in nature and it did not stop the plaintiff to pursue this legal action against the first defendant. However, the plaintiff was not pursuing against the first defendant by reason of the restraining order obtained by the first defendant. Even though the plaintiff was not pursuing against the first defendant and judgment could not be entered against the first defendant, the second and third defendants' liability for the indebtedness was not in any way absolved or discharged. Thus, the second and third defendants' liability was not dependent or secondary to the liability of the first defendant. The second and third defendants were in fact and in law primarily liable for the indebtedness of the first defendant under the agreement in relation to the payment of the financing (see paras 31–32).

[Bahasa Malaysia summary

Plaintif adalah institusi kewangan yang dilesenkan untuk menyediakan produk dan perkhidmatan perbankan yang berkaitan dengan Islam dan Syariah.

Melalui surat tawaran plaintif, perjanjian kemudahan umum dan perjanjian kemudahan jaminan bank Al-Kafalah yang masing-masing dilaksanakan antara plaintif dan syarikat defendan pertama ('perjanjian'), plaintif memberikan, menyediakan dan melanjutkan pembiayaan perbankan dan kredit ('pembiayaan') kepada defendan pertama berdasarkan terma dan syarat perjanjian. Dengan pertimbangan plaintif membuat atau memberikan kemudahan perbankan dan kredit atau pembiayaan kepada defendan pertama, defendan kedua dan ketiga melaksanakan surat jaminan dan indemniti ('jaminan'), di mana defendan kedua dan ketiga menjamin dan bersetuju tanpa syarat dan tidak dapat ditarik balik untuk membayar berdasarkan jumlah agregat dari semua jumlah yang perlu dibayar dan terhutang oleh defendan pertama kepada plaintif sama seperti yang telah dikemukakan oleh plaintif bersama dengan semua komisen, keuntungan, kos dan caj termasuk kos undang-undang atas dasar indemniti penuh. Berdasarkan kegagalan defendan pertama dalam pembayaran kemudahan pembiayaan, plaintif memulakan tindakan sivil ini untuk mendapatkan wang yang perlu dibayar dan terhutang. Plaintif memfailkan permohonan untuk memasukkan penghakiman terus terhadap semua defendan. Walau bagaimanapun, plaintif tidak meneruskan permohonan terhadap defendan pertama kerana defendan pertama telah memperoleh perintah mahkamah yang melarang semua proses undang-undang terhadap defendan pertama. Oleh itu, permohonan ini oleh pihak plaintif untuk memasukkan penghakiman terus terhadap defendan kedua dan ketiga sahaja.

Diputuskan, membenarkan permohonan penghakiman terus:

(1) Plaintif telah memenuhi syarat awal yang diperlukan. Oleh itu, plaintif telah membuktikan kes prima facie berkenaan tuntutannya terhadap defendan. Defendan memang mencabar kesahihan, kesahan dan penguatkuasaan perjanjian dan jaminan. Namun, ini adalah pernyataan umum semata-mata tanpa menyatakan kejadian atau keadaan atau peruntukan perjanjian dan jaminan yang relevan yang mungkin menjadikannya tidak sah, terbatal atau tidak dapat dilaksanakan. Tuduhan tidak sah, terbatal dan tidak dapat dilaksanakan ini tidak dikemukakan oleh defendan sebagai isu untuk dibicarakan untuk menolak permohonan plaintif untuk penghakiman terus. Ini sekadar fikiran terkemudian oleh pihak defendan untuk menafikan plaintif remedi mereka untuk mendapatkan kembali hutang defendan pertama dan untuk menghindari tanggungjawab defendan berdasarkan perjanjian dan jaminan. Melalui pengakuan mereka sendiri, tidak ada pertikaian mengenai liabiliti defendan pertama di bawah perjanjian itu dan tanggungjawab defendan kedua dan ketiga di bawah jaminan untuk membayar kepada plaintif jumlah yang harus dibayar dan terhutang kepada plaintif berkaitan dengan kemudahan pembiayaan. Berdasarkan pada pengakuan defendan, jelas bahawa defendan tidak mempunyai

pembelaan terhadap tuntutan yang dibuat oleh plaintif (lihat perenggan 20 & 24–26).

(2) Aduan defendan mengenai dakwaan tingkah laku menindas dan permintaan tidak wajar oleh OCBC Bank tidak ada kaitan dengan tuntutan plaintif untuk hutang yang belum dijelaskan di bawah kemudahan pembiayaan terhadap defendan. Pertikaian defendan hanya berfungsi sebagai faktor pengurangan pertimbangan plaintif. Oleh itu, kedudukan kewangan defendan pertama dan tindakan OCBC Bank dalam menuntut kemudahan yang diberikan olehnya kepada defendan pertama bukanlah pembelaan dan isu untuk dibicarakan (lihat perenggan 27–28).

(3) Nasihat yang diberikan oleh Jawatankuasa Skim Penyelesaian Pinjaman Kecil untuk menghentikan prosiding terhadap defendan pertama tidak bersifat wajib dan tidak menghalang plaintif untuk meneruskan tindakan undang-undang ini terhadap defendan pertama. Walau bagaimanapun, plaintif tidak meneruskan terhadap defendan pertama dengan alasan perintah larangan yang diperolehi oleh defendan pertama. Walaupun plaintif tidak meneruskan terhadap defendan pertama dan penghakiman tidak dapat dijatuhkan terhadap defendan pertama, liabiliti defendan kedua dan ketiga atas hutang tersebut sama sekali tidak dilepaskan atau dibebaskan. Oleh itu, liabiliti defendan kedua dan ketiga tidak bergantung atau sekunder kepada liabiliti defendan pertama. Defendan kedua dan ketiga secara hakikat dan undang-undang bertanggung jawab atas hutang defendan pertama berdasarkan perjanjian yang berkaitan dengan pembayaran pembiayaan (lihat perenggan 31–32).]

Cases referred to

Andrew Lee Siew Ling v United Overseas Bank (M) Bhd [2013] 1 MLJ 449, FC (folld)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 2 CLJ Rep 186; [1992] 1 CLJ 653, SC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)

United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657; [1999] 2 CLJ 151, FC (refd)

Legislation referred to

Rules of Court 2012 O 14 rr 1, 2, 3, 4

Marina Nasution (Shearn Delamore & Co) for the plaintiff.
S Sri Nagavarnan (Rizal Many & Logan) for the defendant.

Khadijah Idris JC:

INTRODUCTION

[1] This is a civil action filed by the plaintiff to recover monies due and payable pursuant to Islamic financing facilities granted to the first defendant. In consideration of the financing facilities granted to the first defendant, the second and third defendants agreed to guarantee the payment of the said facilities by the first defendant to the plaintiff. Pursuant to the first defendant default in making payment of the said financing facilities, the plaintiff commenced this civil action.

[2] The plaintiff filed an application to enter summary judgment against all the defendants. However on the hearing date of the said application learned counsel for the plaintiff informed the court that the plaintiff is not pursuing the said application against the first defendant as the first defendant has obtained a court order restraining all legal proceedings against the first defendant. This court proceeded to hear the plaintiff's application to enter summary judgment against the second and third defendants only.

[3] Having considered both parties pleaded case, affidavits and submission this court allowed summary judgment to be entered against the second and third defendants in terms of the prayers as stated in encl 13. The second and third defendants appealed.

FACTUAL BACKGROUND

[4] The plaintiff is a financial institution licensed to provide Islamic and Syariah related banking products and services. By the plaintiff's letters of offer dated 14 June 2013 and 20 December 2017, the general facility agreement dated 25 September 2013 and 18 January 2018 and the Al-Kafalah Bank guarantee facility agreement dated 25 September 2013 and 18 January 2018 respectively executed between the plaintiff and the first defendant company ('the agreement'), the plaintiff granted, availed and extended banking and credit financing ('the financing') to the first defendant upon the terms and conditions of the said agreement.

[5] The financing, with a limit sum of RM10m, consists of the following facilities:

(a) letter of credit-i ('Murabahah');

(b) Murabahah working capital financing-i;

(c) accepted bills-i ('Murabahah');

A (d) shipping guarantee-i ('Kafalah');

(e) bank guarantee-i ('Kafalah'); and

(f) foreign exchange line ('Forex').

B (collectively referred to as 'the financing facilities')

[6] The terms and conditions of the agreement as pleaded in the plaintiff's statement of claim and averred in their affidavit supporting the application for summary judgment are reproduced below:

C (a) in consideration of the plaintiff having granted or continuing to grant the financing facilities, the defendant covenants to pay all sums covenanted to be paid under the agreement including commissions, profit and other charges as provided for in the agreement;

D (b) the plaintiff shall be entitled to demand ta'widh (compensation) at the rate stipulated in the agreement upon the failure of the first defendant to make payment of any amount covenanted to be paid under the agreement on its due date or upon recall or termination of the financing facilities;

E (c) upon the occurrence and continuance of any event of default stipulated in the agreement, including, inter alia, if the first defendant defaults in payment of the agreed instalments or any other sums after the same shall have become due and/or if the first defendant commits a breach of its obligations, the plaintiff shall be at liberty to cancel the financing facilities and the total aggregate principal amount of the financing or the balance thereof outstanding with the plaintiff's profit margin and all other monies and liabilities payable by the defendant on the financing facilities shall become immediately due and payable and the plaintiff shall further be at liberty to exercise all its rights and remedies for recovery of such sums;

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(d) the first defendant shall indemnify the plaintiff against all losses, damages and expenses (including legal expenses on a solicitor client basic) incurred by the plaintiff in consequence of any default by the first defendant of any sums due under the financing facilities;

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(e) a statement by the plaintiff as to any amount due under the financing facilities shall be final and conclusive evidence that such amount is in fact due and payable;

I (f) time shall be of the essence of the agreement;

(g) all securities, liabilities and obligations created by the agreement shall continue to be valid and binding notwithstanding any change, amalgamation or reconstruction of the plaintiff and/or the first defendant;

(h) the agreement shall be binding upon the permitted assigns of the first defendant and on the successors in title and assign of the plaintiff;

(i) the agreement shall be governed and construed in accordance with the laws of Malaysia;

(j) the plaintiff shall have the right to exercise all or any of the remedies of available to the plaintiff and to exercise such remedies concurrently including pursuing remedies of sale and civil suit to recover all monies due and owing to the plaintiff;

(k) any demand issued by the plaintiff in the manner stipulated in the agreement shall be deemed received by the first defendant; and

(l) the financing facilities and the terms and conditions of the agreement shall be subject to the plaintiff's right to vary the same pursuant to the terms and conditions of the agreement.

[7] In consideration of the plaintiff making or giving banking and credit facilities or financing to the first defendant, the second and third defendants executed the letter of guarantee and indemnity dated 25 September 2013 and 18 January 2018 ('guarantees'), whereby the second and third defendants guaranteed and agreed unconditionally and irrevocably to pay on demand the aggregate of all sums due and owing by the first defendant to the plaintiff on the same (including therefore the financing facilities) as advanced by the plaintiff together with all commission, profit, cost and charge including legal costs on a full indemnity basis.

[8] The terms and conditions of the guarantees as pleaded in the plaintiff's statement of claim and averred in their affidavit supporting the application for summary judgment are reproduced below:

(a) the said guarantees shall be a continuing security to cover any sums or money which shall for the time being constitute the monies remaining unpaid by the first defendant;

(b) the said guarantees shall be without prejudice and not be affected nor will the second and third defendants be affected released or exonerated by, inter alia:

(i) variation or increase of the financing facilities availed to the first defendant;

(ii) any other securities or guarantees held in respect of the monies guaranteed;

(iii) any variation, exchange, renewal, release, modification or variation of the terms of the financing facilities or any securities; and

(iv) any time, forbearance, relaxation or indulgence given or extended to the first defendant.

(c) any certificate in writing by the plaintiff of the amounts outstanding by the first defendant shall be conclusive evidence against the second and third defendants of the amount of the defendants indebtedness under the guarantees in any legal proceedings;

(d) any demand for payment of monies due may be sent to the second and third defendant's address for service or last known address by prepaid registered post and shall be deemed after such posting on the second and third defendants;

(e) the second and third defendants irrevocably appoint the first defendant as their agent for service of any legal process subject to the plaintiff being entitled to served such process in the manner permitted by law;

(f) time for payment of the sums guaranteed shall be of the essence;

(g) that as between the plaintiff and the second and third defendants, the second and third defendants shall be principal debtor for the sums guaranteed; and

(h) the guarantees shall not be determined or prejudiced by any amalgamation of the plaintiff and is binding upon the heirs and permitted assign of the second and third defendants.

[9] The first defendant breached the terms and conditions of the agreement when it failed to make payment and settlement of the sums falling due and payable on the bill(s)-i that had matured and fallen due for payment.

[10] Pursuant to the breach and ensuing event of default, by a letter of demand dated 9 July 2018 to the first defendant, the plaintiff notified the first defendant that the financing facilities stood cancelled and terminated and demanded that all sums due payable on bill(s)-(i) that had matured for payment be paid within seven days from the date of the said letter and demanded that the first defendant promptly and punctually pay all bill(s)-i that mature for payment in the future. The first defendant was also notified that in the event the sums demanded are not received, the plaintiff would proceed to uplift the deposit(s)/fund(s) held, as security for the financing facilities and utilise the same and accrued profits (if any) towards part payment of the outstanding sums before commencing action against the defendants for the recovery of the balance outstanding sums due.

[11] Pursuant to the terms and conditions of the guarantees, by a letter of demand dated 9 July 2018 ('the guarantee demand') to the second and third defendants, the plaintiff demanded the payment of all sums due payable on

bill(s)-i that had matured for payment within seven days from the date of the said letter and demanded that the second and third defendants promptly and punctually pay all accepted bills-i that mature for payment in the future. The letter also gave notice that in the event the sums demanded are not received, the plaintiff would proceed to uplift the deposit(s)/fund(s) held, as security for the financing facilities and utilise the same and accrued profits (if any) towards part payment of the outstanding sums before commencing action against the second and third defendants for the recovery of the sum due owing and payable.

[12] In breach of the terms and conditions of the agreement and guarantees the defendants failed to promptly pay the outstanding sum. Instead vide letter dated 13 July 2018 the defendant only seek that the plaintiff uplift deposit(s)/fund(s) maintained by the first defendant with the plaintiff towards part payment of the outstanding sum.

[13] Pursuant to the upliftment of deposit(s)/fund(s) held by the plaintiff as security for the financing facilities, at 30 July 2018, a sum of RM1,173,242.40 still remain due owing and payable on the bills-i that have matured for payment as at 30 July 2018. Particulars of the sum due and owing is as follows:

(a) past due bills-i facility matured as at 30 July 2018:

No	Bill No	Date established	Maturity date	Balance outstanding as at 30 July 2018 (RM)
1.	K102624001	6 March 2018	26 June 2018	251,075.85
2.	K102625001	6 March 2018	29 June 2018	173,749.97
3.	K102681001	4 April 2018	27 July 2018	748,416.58
Total				1,173,242.40

With further Ta'widh continuing on the principal balance (RM1,148,609.84 as at 30 July 2018) from 31 July 2018 to the date of full and final realisation at the prevailing Islamic Interbank Money Market published by Bank Negara Malaysia or any other method of calculating as approved by Bank Negara's Syariah Advisory Council.

SUMMARY JUDGMENT APPLICATION

[14] Vide encl 13, the plaintiff sought for summary judgment be entered against the defendants in the following terms:

(a) that the first, second and third defendants jointly and severally pay to the plaintiff:

(i) the sum of RM1,173,242.40 due and outstanding as at 30 July

2018 on bills-i matured as at 30 July 2018 and issued under the financing facilities availed to the first defendant; and

(ii) compensation (ta'widh) for late payment at the Interbank Islamic Money Market Rate (being at 3.2%pa as at 30 July 2018) from the 31 July 2018 until the date of full and final settlement on the outstanding principal balance of (RM1,148,609.84 as at 30 July 2018) or any other method of calculation approved by the Syariah Advisory Council of Bank Negara Malaysia.

(b) cost on a solicitor and client basis.

[15] In its affidavit in support of the application for summary judgment the plaintiff through its Senior Assistant Vice President of Business Financing Supervision and Recovery, Financing Supervision and Rehabilitation Department verified the facts which forms the basis of the plaintiff's claim against the defendants which is essentially set out in paras 4–13 above. The deponent avers that at the commencement of this action the defendants were justly and truly indebted to the plaintiff for the sum claim as stated in para 13 above and that the said debt was incurred and still due and owing. The deponent further avers that it is the plaintiff's belief that the first, second and third defendants has no defence to the plaintiff's claim and that there is no triable issue requiring this matter to proceed for full trial.

THE DEFENDANTS' CONTENTIONS

[16] The first, second and third defendants' affidavit to resist the summary judgment was deposed by the third defendant who is a director in the first defendant company and authorised to affirm the affidavit on behalf of the first and second defendants. The defendants raised the following issues as issues to be tried:

(a) initially the first defendant maintain a good and satisfactory repayment record with the plaintiff. However the first defendant's financial ability to pay the financing has been adversely affected due to the improper demand made by OCBC Bank on the first defendant's receivable purchase facilities of RM30m with OCBC Bank. The first defendant has lodged a formal complaint with Bank Negara Malaysia against OCBC oppressive and improper conduct;

(b) the first defendant has applied to Bank Negara Malaysia by way of Small Debt Resolution Scheme ('SDRS') on 28 August 2018 for the purpose of restructuring the first defendant financing facilities; and

(c) a meeting was held with SDRS Committee and other banks which provided financing facilities to the first defendant. By way of email dated

24 September 2018, the SDRS Committee has instructed that all banks halt legal proceedings pending completion of the restructuring process by the SDRS Committee.

THE LAW

[17] Pursuant to O 14 rr 1 and 2 of the Rules of Court 2012 ('the ROC 2012'), in an application for summary judgment, it is incumbent on an applicant seeking the same to prove the following:

(a) the statement of claim has been served on the defendant;

(b) the defendant has entered appearance; and

(c) the applicant has affirmed an affidavit verifying the facts on which the statement of claim is based. The applicant is also required to affirm his belief that the defendant has no defence to the statement of claim.

[18] Upon the fulfilment of the above preliminary requirements the burden is on the defendant to prove under O 14 rr 3 and 4 of the ROC 2012 that there is an issue or question in dispute which ought to be tried (*National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283; *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544). An application for summary judgment may also be dismissed by the court if the defendant satisfies the court that there ought for some other reason to be a trial namely there are circumstances that ought to be investigated by the court (*United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151).

[19] In considering summary judgment application this court is ever mindful of the principles laid in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 2 CLJ Rep 186; [1992] 1 CLJ 653:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court ...
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> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues

of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

FINDINGS OF THE COURT

[20] Having perused the plaintiff's affidavit (encl 14) supporting the summary judgment application, this court is of the view that the plaintiff has fulfilled the requisite preliminary requirements. The plaintiff has verified the facts (importantly the terms and conditions of the agreement) and exhibited the relevant contemporaneous documents in relation to the agreement and the financing facilities which form the basis of the plaintiff's claim against the first defendant as the customer to whom the financing facilities were granted. The facts in relation to the guarantee given by the second and third defendants under the letter of guarantee and indemnity and the salient terms of the same were also verified by the plaintiff through its Senior Assistant Vice President. The plaintiff has also deposed that the sum claim (as stated in prayer 1 and 2 of encl 13) is due and payable and that it is their belief that the defendants has no defence to the claim made against the defendants. Thus the plaintiff has established a prima facie case in respect of its claim against the defendants.

[21] The burden therefore shifts on the defendants to prove that there are issue or question in dispute which ought to be tried or there ought for some other reason to be a trial, namely, there are circumstances that ought to be investigated by the court.

[22] It is to be noted that in their affidavit in reply (encl 15) to the plaintiff's affidavit supporting the summary judgment application (encl 14), the defendants at paras 4, 5 and 6 of encl 15 admits to the averments made by the plaintiff in paras 3, 4, 5 and 6 of encl 14. By such admission, the first, second and third defendants:

(a) admit that they are justly and truly indebted to the plaintiff for the sum RM1,173,242.40 due and outstanding as at 30 July 2018;

(b) admit that they are liable for the compensation ('ta'widh') for late payment at the Interbank Islamic Money Market Rate (being at 3.2%pa as at 30 July 2018) from the 31 July 2018 until the date of full and final settlement on the outstanding principal balance of (RM1,148,609.84 as at 30 July 2018) or any other method of calculation approved by the Syariah Advisory Council of Bank Negara Malaysia;

(c) admit that they are liable to pay cost to the plaintiff on a solicitor and client basis;

(d) admit that the financing were extended to the first defendant and that the first defendant has availed itself of the financing; and

(e) admit that the financing were extended to the first defendant upon the terms and conditions in the agreement in particular the salient terms sets out in para 5 of the plaintiff's supporting affidavit encl 14.

[23] Even though no specific admission were made in the defendants' affidavit in relation to the unconditional and irrevocable guarantees given by the second and third defendants, it is to be noted that in para 8 of the defendants' statement of defence the defendants admit the contents of paras 10 and 11 of the plaintiff's statement of claim. Paragraphs 10 and 11 of the statement of claim essentially sets out the facts relating to the unconditional and irrevocable guarantees executed by the second and third defendants in favour of the plaintiff where the second and third defendants agree to pay on demand the aggregate of all sums due and owing by the first defendant to the plaintiff in relation to the financing facilities including, inter alia, profit, cost and charges on a full indemnity basis. The same pleaded facts is also averred by the plaintiff in paras 9 and 10 of their affidavit encl 14. Although in their affidavit encl 15 the defendants did not specifically admit to the plaintiff's averment in paras 9 and 10 of encl 14, the defendants are bound by their pleadings.

[24] The defendants did however in paras 5 and 8 of their statement of defence challenge the legality, validity and enforcement of the agreement and guarantees. However these are mere general assertions without specifying the instances or circumstances or the relevant provision of the agreement and guarantee which may render the same to be illegal, invalid or unenforceable. It is to be noted this allegations of illegality, invalidity and unenforceability were not raised by the defendants as triable issues to resist the plaintiff's application for summary judgment. This court is compelled to conclude this is mere afterthought on the part of the defendants to deny the plaintiff of their remedy to recover the indebtedness of the first defendant and to evade the defendants liability under the agreement and guarantees.

[25] Thus by their own admission, there is no dispute of the first defendant's liability under the agreement and the second and third defendants' liability under the guarantees to pay to the plaintiff the sum due and owing to the plaintiff in relation to the financing facilities. The defendants' admission of their liability to pay sum demanded against them explain the reason why the certificate of indebtedness (exh BMMB6 to encl 14) issued under the conclusive evidence clause was not specifically referred to and challenged by the defendants.

[26] Premised on the defendants admission, it is evidently clear that the

defendants has no defence against the claim made by the plaintiff. On this alone, the plaintiff's application to enter summary judgment against the second and third defendants ought to be allowed. However for completeness, this court will deal with the purported triable issues raised by the defendants.

Whether there are bona fide triable issues to be tried

The first defendant's inability to make payment of the financing is due to OCBC Bank's oppressive conduct and improper demand of the first defendant receivable purchase facilities of RM30m with OCBC Bank

[27] As rightly contended on behalf of the plaintiff, the defendants' complaint about the alleged oppressive conduct and improper demand by OCBC Bank has no relevance to the plaintiff's claim for the debt outstanding under the financing facilities against the defendants. The said complaint is a matter for the defendants to sort out with OCBC Bank. The plaintiff is not privy to the grouses the defendants has against OCBC Bank.

[28] The defendants' contentions that they has a good and satisfactory repayment record with the plaintiff and the OCBC Bank's demand on the first defendant's receivable purchase facilities of RM30m which has adversely affected the first defendant's business and financial situation, if at all, serves only as mitigating factors for the consideration of the plaintiff. Such factors does not prevent the plaintiff from pursuing their contractual right to recover the indebtedness that is owing and due by the defendants in relation to the financing facilities. This is because the defendants are bound by the contractual terms and conditions of the agreement and the guarantees that they have executed, in particular their obligation to pay the indebtedness. Thus the first defendant financial position and OCBC Bank's action in demanding the facilities granted by it to the first defendant is not a defence nor triable issue.

The pending restructuring process by the SDRC Committee

[29] It is the defendants' argument that the SDRS Committee has instructed all banks which provided financing facilities to the first defendant including the plaintiff to halt all legal proceedings pending the completion of the restructuring process by the SDRS Committee.

[30] As pointed out by the plaintiff, the SDRS Committee was set up by Bank Negara Malaysia as an effort to assist small and medium enterprises ('SMEs') to resolve impaired financing with multiple financial institutions. In the enhancement of the policy and guidelines of the Small Debt Resolution Scheme ('SDRS') (BNM/RH/GL028-8) issued by Bank Negara Malaysia on 11 July 2014, paragraph 8.6 states as follows:

8.6 All participating financial institutions are advised to halt legal proceedings, effective from the date the applications are received to the occurrence of either of the following events:

8.6.1 SDRC concurs with the decision of the participating financial institution to reject the application for rescheduling or restructuring; or

8.6.2 Where the applicant defaults on the terms of any approved rescheduling restructuring terms.

[31] As can be seen from the above provision, the alleged instruction is merely an advice and not a mandatory instruction to be complied by the participating financial institution which includes the plaintiff. As can be gathered from the name of the document itself it is a policy document which sets outs the objective, applicability and procedure to facilitate the SDRS objective to support viable SMEs facing financial difficulties and for financial institutions to play an effective role in facilitating the rehabilitation of viable SMEs. The documents serves as a guideline which is not intended to be legally binding. Thus the advice given by the CDRS Committee to halt proceedings against the first defendant is not mandatory in nature and it does not stop the plaintiff to pursue this legal action against the first defendant. Be that as it may, as stated above the plaintiff is not pursuing against the first defendant by reason of the restraining order obtained by the first defendant.

[32] In so far as the second and third defendants are concerned, as stated above they are bound by the unconditional and irrevocable guarantees and accordingly they are liable for the indebtedness of the first defendant. It is important to emphasise here that as they have agreed, their liability for the indebtedness is not only as guarantor but also as principal debtor. As such even though the plaintiff is not pursuing against the first defendant and judgment cannot be entered against the first defendant, the second and third defendants liability for the indebtedness is not in any way absolved or discharged. In *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449, the Federal Court discussed several clauses contained in a letter of guarantee and indemnity executed by the appellant which clearly showed the intention of the guarantors to undertake liability for the repayment of the loan and interest not merely as sureties but also as principal debtors and indemnifiers. It was held by the court:

[23] It is our considered view that in the present case the appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself. The liability under a contract of indemnity does not depend on whether the principal debt is enforceable. It has no reference in law to the obligation of any third person. In essence, the liability of the person who has given an indemnity can be more extensive than that of the liability of the principal

borrower (see the cases of (1) *Yeoman Credit Ltd v Latter and Another* [1961] 2 All ER 294 and (2) *Chung Khiaw Bank Ltd v Soi Huan & Ors* [1986] 1 MLJ 188).

Thus in the instant case the second and third defendants' liability is not dependent or secondary to the liability of the first defendant. The second and third defendants are in fact and in law primarily liable for the indebtedness of the first defendant under the agreement in relation to the payment of the financing.

CONCLUSION

[33] It is without doubt that the defendants has no defence to the plaintiff's claim and the issues raised are not triable. Accordingly there is no justification for this court to order a full trial. Instead, this is an appropriate and proper case to be disposed of summarily. As such judgment in terms of encl 13 was accordingly entered against the second and third defendant and as the learned counsel for the plaintiff has asked for costs to be fixed by this court (and not on solicitor client basis as prayed), costs of RM5,000 was granted to the plaintiff.

Summary judgment application allowed.

Reported by Ahmad Ismail Illman Mohd Razali